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In the Supreme Court

of the

United States

October Term 1968

GLENS FALLS INSURANCE CO.,

Petitioner,

vs.

NATIONWIDE MUTUAL INSURANCE CO. and STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Respondents

Petition for Writ of Certiorari to the Supreme Court of the State of Montana

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Respondents

Petition for Writ of Certiorari to the Supreme Court of the State of Montana

---

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of Montana which affirmed a judgment of the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone, and which in the opinion of the petitioner is clearly in di-

rect conflict with a prior decision of the United States Court of Appeals for the Ninth Circuit and with *Clause 6, Sec. 10 of Article I, Sec. 1 of Amendment 14, and Clause 3, Sec. 8 of Article I* of the United States Constitution.

OPINIONS BELOW

The District Court delivered no written opinion or discussion of the case, but did make certain Findings of Fact and Conclusions of Law in connection with the entry of the decree in question. Copies of these Findings and Conclusions are attached in the *Appendix, pp. 1-7,* The opinion of the Montana Supreme Court is not yet reported.

JURISDICTION

Judgment of the Supreme Court of the State of Montana affirming the lower court decision was entered December 12, 1968, and a copy thereof is appended in the *Appendix at pp. 8-16.* The jurisdiction of this court is invoked under *28 U.S.C. 1257 (3).*

QUESTIONS PRESENTED

A statute of the State of Montana governing transfer of ownership of motor vehicles provides in part:

> "(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective *for any purpose.*"

(53-109(d), R.C.M., 1947) (emphasis supplied)

The petitioner's policy of insurance covering an automobile agency contained a provision excluding coverage for any vehicle when its *"possession has been transferred to another by the named insured pursuant to an agreement of sale."*

In refusing to acknowledge the validity of the foregoing exclusion in petitioner's policy in a case involving the sale of a motor vehicle where the title was not transferred on the records of the motor vehicle registrar, the Montana Supreme Court held that *Sec. 53-109(d)* means precisely what it says, i.e., that:

> "said intended transfer shall be incomplete and not be valid or effective *for any purpose."*

The questions presented are is *Sec. 53-109(d)* of the Revised Codes of Montana contra to:

1. Ruling of Ninth Circuit in *Colbrese v. National Farmers Union Property and Casualty Co., 368 F2d 405; Cert. den. 386 U.S. 991, (1967).*

2. *Sec. 10, Article I* of the United States Constitution which provides that "No state shall . . . . pass any . . . . law impairing the obligation of contracts, ..."

3. *Sec. 1 of the Fourteenth Amendment* which provides that no state shall "deprive any person of life, liberty or property without due process of law."

4. *Clause 3, Sec. 8 of Article I* granting the Congress "power to regulate commerce . . . . among the several states."

STATUTE INVOLVED

The Montana statute involved is *Sec. 53-109 R.C.M., 1947.* It s provisions are quoted and its history set forth by the Montana Supreme Court in a case somewhat similar to this one, *Safeco Insurance Co. v. Northwestern Mutual Ins. Co., (1963) 142 Mont. 158 through 163; 382 P2d at 176 through 178.*

Subparagraph (d) of *Sec. 53-109* quoted above under the sub-head "Questions Presented."

STATEMENT

The material facts in this case are not in dispute. On July 15, 1964, one William Parker signed a contract to purchase a 1956 Mercury sedan from Midland Dodge, Inc., of Billings, Montana, for $296.00. Parker paid *Midland* $100.00 cash and traded in a 1954 Chevrolet valued at $120.00 and was to pay the balance in two monthly installments. *Midland* surrendered possession of the vehicle to Parker and his minor son, in whose name the vehicle was ultimately to be titled and young Parker took possession of the Mercury, but *Midland* kept possession of the title.

On July 26, 1964, young Parker was involved in a two-car accident with the automobile resulting in its destruction. After the accident, he paid the balance owing to *Midland* and received from *Midland* the title to the Mercury, but never forwarded the title to the Montana registrar of motor vehicles.

After being sued because of the accident by the driver and passenger in the other auto, young Parker filed a third-party complaint against Nationwide Mutual Insurance Co., Glens Falls Insurance Co. and State Farm Mutual Automobile Insurance Co.

At the time of the accident, *Nationwide* had a liability insurance policy insuring a vehicle owned by William Parker other than the Mercury or the Chevrolet traded in. *Glens Falls* insured *Midland*. *State Farm* carried uninsured motorist's coverage on the parents of one of the plaintiffs in the original action.

At the time of the accident young Parker lived with his father, William.

The matter was submitted to the District Court on a Motion for Summary Judgment after the filing with the court of the depositions of William Parker and his son, the policies issued by the three insurance companies and copies of the certificate of title and contract for agreement of sale between *Midland* and William Parker. The court ruled in favor of *Nationwide* and *State Farm* and against *Glens Falls*. Because the original actions had been set for trial, *Glens Falls* settled them. The district court decision was affirmed by the Montana Supreme Court.

* * *

It is the contention of *Glens Falls* that either *Na-*

tionwide or *State Farm* is liable over to *Glens Falls* for sums paid to the plaintiff and to the attorney of the defendant.

The insurance policy of *Glens Falls* contained the following definition of an insured:

> "B. Definition of Insured: Persons Insured: Each of the following is an insured with respect to the Garage Operations Hazard except as provided below: . . . .
>
> (3) with respect to the Automobile Hazard: . . . .
>
> *None of the following is an insured: . . . .*
> *(iii) Any person or organization other than the named insured with respect to any automobile* (a) owned by such person or organization or by a member (other than the named insured) of the same household or (b) *possession of which has been transferred to another by the named insured pursuant to an agreement of sale."* (emphasis supplied)

During oral argument before the Montana Supreme Court, attorney for petitioner pointed out that if effect was not given to the foregoing exclusion, *Sec. 53-109(d) Revised Codes of Montana,* impaired the right of *Glens Falls* and *Midland* to contract. The policy exclusion was not mentioned in the opinion of the Montana Supreme Court. However, the U. S. Supreme Court has authority to review a state court decision notwithstanding that the appellate state court did not refer to the constitutional questions in its opinion. *International Harvester Co. vs. Missouri (Mo. 1914), 34 S.Ct. 859, 234 U.S. 199, 58 L.E. 1276.*

The U. S. Supreme Court has the right to look into

the opinion of the state court for the purpose of discovering the ground on which the judgment of the court actually proceeded, but it is not binding on the Supreme Court, and where the opinion is in favor of the party who claims a right or immunity under the Federal Constitution, and the judgment as rendered actually denies such right or immunity, a federal question is involved which gives the Supreme Court jurisdiction. *Bank of Commerce vs. Tennessee (Tenn. 1896), 16 S.Ct. 1113, 163 U.S. 416, 41 L.Ed. 211.*

Moreover, it would appear that petitioner need not have set up below in *"haec verba"* the exact constitutional grounds on which it was relying if the position of the petitioner was made clear to the court below and the court below considered that position in its opinion.

> "While the right was not originally specially set up and claimed, * * * under the rule of this court requiring the opinions to be sent up with the record, it has frequently been held to be a sufficient compliance with the words 'specially set up and claimed,' that it was fully considered in the opinion of the court and ruled against the plaintiff in error." *San Jose Land, etc., Co. v. San Jose Ranch Co., (Cal. 1903), 23 S.Ct. 487, 189 U.S. 177, 47 L.Ed. 765.*

The failure of the Montana court specifically to base its decision on constitutional grounds does not deprive the U. S. Supreme Court of jurisdiction.

> "On petition for certiorari to review a decree of a state court as denying or not duly recognizing a federal right set up therein, it is the Supreme Court's

province to inquire, not only whether such right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision without fair support." *Ancient Egyptian Arabic Order of Nobles of The Mystic Shrine v. Michaux, (Tex. 1929), 49 S.Ct. 485, 279 U.S. 737, 73 L.Ed. 931.*

(1) *Decision Contra to Ninth Circuit Decision*

Two important recent cases interpreting this section of Montana law and arriving at opposite concl-u sions are *Safeco Ins. Co. of America vs. Northwestern Mutual Ins. Co., 142 Mont. 155, 382 P.2d 174 (1963)* and *Colbrese vs. National Farmers Union Prop. & Casualty Co., 368 F.2d 405; Cert. den. 386 U.S. 991 (1967).*

In *Safeco,* Bear Paw Sales and Service of Havre, Montana, had for sale a used Studebaker for which it held the certificate of title. Northwestern Mutual Insurance Co. had issued to Bear Paw a blanket garage owner's liability policy covering vehicles owned by Bear Paw while used in its business or while being driven with its permission and consent. Harlan Dean was the owner of a Hillman on which title had been issued to him subject to a mortgage. The Hillman was covered by a liability insurance policy issued by *Safeco* which carried the usual provisions insuring Dean against liability arising out of use of the Hillman or any "owned" replacement. Dean drove the Hillman to Bear Paw's premises and made arrangements with the sales

manager to try out the Studebaker and show it to his wife. A price of $350.00 plus trade-in was discussed. Dean left the Hillman with Bear Paw and drove away in the Studebaker which he used in his work as a salesman on that day, The following day Dean told Bear Paw that he would take the Studebaker and he continued in possession of the car for the next two days. On the second day he was involved in a collision. *Northwestern* refused to accept any liability under the garage owner's liability policy and *Safeco* filed a complaint seeking a declaratory judgment in order to have judicially determined which company was primarily responsible for Dean's defense and any liability imposed upon him as a result of the collision. The case was submitted on depositions. The District Court found that there was a completed sale and that Dean was the "owner" of the vehicle as that word was used in the *Safeco* policy. The District Court also found that the Studebaker was a replacement vehicle under *Safeco's* policy. Each policy contained similar "other insurance" clauses to the effect that with respect to a "non-owned" automobile coverage was afforded only as to the existence of liability over any other valid and collectable insurance. The issue was thus narrowed to whether Dean was the "owner" of the Studebaker at the time of the accident.

In its decision reversing the lower court, the Montana Supreme Court noted that while Bear Paw had a

record of the Studebaker and that when, ordinarily, an automobile is sold, Bear Paw would make a book entry covering the name of the purchaser, what it was sold for, and the date of the sale, no book entries were made with respect to this vehicle. Dean did not sign any order or contract of any kind and Dean still had title to the Hillman in his possession while Bear Paw had title to the Studebaker. Bear Paw had no records on the Hillman. Following Dean's recovery from his injuries as a result of the collision, either he or his wife took the Hillman back from the sales lot of Bear Paw and the matter was thus concluded.

The plaintiff contended that a change of ownership cannot be effected orally or in any other manner than through transfer of the certificate of title as required by the statute. The defendant maintained that the statute is a recording statute governing the record title as distinguished from actual ownership. The Supreme Court agreed with the plaintiff.

> "There is nothing unrealistic, technical or artificial about this simple procedure for the transfer of ownership of a motor vehicle. While defendants contend that even when following the statutory procedure dire consequences could result because of what might occur during the ten-day period (when the registrar of motor vehicles is transferring the title to the new owner), it seems to us rather clear that when the seller has executed the transfer upon the certificate of ownership and delivered it and the motor vehicle the sale is complete and any delay on the part of the registrar in issuing the new

> certificate of ownership would have no effect. In any regular transaction the new certificate of ownership is required to be issued by the registrar and issued as a matter of course. The transfer then becomes complete and valid and *dates back to the time of the transfer between the parties.* If the transfer has not been made in compliance with the statute and the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership in its inception." *142 Mont. 164, 382 P.2d 176.* (emphasis supplied)

Although in *Safeco* the court did not consider the situation where the title was given to the purchaser but he neglected to send it to the registrar, the foregoing was cited with approval in the instant case.

The facts in the *Colbrese* case went far beyond those in *Safeco.* On about September 2, 1958, a Mrs. McCormick agreed to sell a 1949 Ford to Albert Kinney for a certain sum which had been paid by Kinney to Mrs. McCormick in full. From September 2, 1958, up to December 3, 1960, the time of the collision, Albert Kinney had been in possession of the vehicle, claimed to be its owner, and had even paid for Montana licenses for the vehicle for the years 1959 and 1960. On four or five occasions between September 2, 1958, and December 3, 1960, Kinney had requested the attorney for Mrs. McCormick to furnish him with a certificate of title, but this had never been done.

U. S. District Judge Jameson said in his decision reported at *227 F.Supp. 978* that he felt bound by *Safeco.*

"The question presented by the motion for summary judgment is whether the 1949 Ford automobile is a 'non-owned automobile' by reason of the fact that no certificate of ownership was ever issued to Kinney in compliance with the provisions of Sec. 53-109, R.C.M., 1947 . . . In *Safeco* the court discussed at some length the history behind *Sec. 53-109,* rejecting the contention that the present statute was intended as a recording statute only . . . Compliance with the specific provisions of *Sec. 53-109* was held to be a prerequisite to transfer of title . . . It is true, as defendant argues, that this case is factually distinguishable from *Safeco* . . . Here as in *Safeco,* the transfer has not been made by the parties in compliance with the statute. Under the holding of the Montana Supreme Court, 'there was no transfer of ownership in its inception' and there 'was never a completed sale' . . . It is possible, as counsel for defendant have suggested, that as applied to a different factual situation the Supreme Court of Montana would modify its interpretation of *Sec. 53-109(d),* I do not feel that I can do so."

Judge Jameson was overruled by the Ninth Circuit which said:

"To hold that Albert Kinney was not the owner of the Ford within the meaning of the policies in suit would do violence to the intention of the parties, to traditional legal concepts of ownership, and to our own sense of right and wrong. There is no Montana authority which, on its facts, compels us to apply the technical statutory requirements for transfer so as to torture the terms of a contract. Absent such compulsion, we will not require appellant to underwrite a risk which it did not sell and for which it was not paid. Upon remand, the action will be dismissed." *368 F.2d 410.*

(2) *Sec. 53-109(d), R.C.M. violates Sec. 10, Article I of the Constitution by impairing insur-*

> *ance contracts which exclude coverage where possesson of a motor vehicle has been transferred to another pursuant to an agreement of sale.*

A distinction between *Safeco* and *Colbrese* on the one hand and the instant case on the other is that in the former two cases a certificate of registration was never delivered to the purchaser whereas here a certificate of ownership was delivered to the purchaser. In its brief in the lower court, *State Farm* declared that the exclusion contained in *Giens Falls'* policy providing that one who has obtained possession of a vehicle pursuant to an agreement of sale is not an insured is ineffective because transfer of possession is the same as "delivery" and under *Safeco* there can be no delivery until the registrar issues a new certificate of ownership

Because the state supreme court ruled in favor of *State Farm,* it must have agreed with it that regardless of whether the realer turns the title over to the buyer, if the latter neglects to send it to the registrar, the policy exclusion is inoperative by reason of *Sec. 53-109(d).* Thus, in effect, *Sec. 53-109(d)* impaired the contracts entered into by petitioner and *Midland.*

> "In cases of this character the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which

reliance is placed upon the subsequent legislation." *McCullough vs. Virginia (Va. 1898), 19 S.Ct. 134, 172 U.S. 102, 116, 117, 43 L.Ed. 382, 387, 388.*

Sec. 53-109(d), Revised Codes of Montana, further violates *Sec. 10, Article I* of the Constitution in that it fails to give effect to the intent of the parties to a contract for sale of an automobile, regardless of whether the contract is completed and predicates completion of the sale upon the ministerial acts of a minor state official, a person not a party to the contract, and prohibits transfer of ownership until such state official transfers upon his records ownership of the motor vehicle to the purchaser.

Not only does the statute nullify contracts between insurance carriers and automobile dealers where the purchaser of an automobile takes possession of all documents concerning registration of the car and himself refuses or fails to forward the certificate of title for transfer to his own name to the registrar of motor vehicles. It also fails to give full faith and credit to the laws and acts of a sister state where a citizen of such state purchases an auto in Montana and obtains all documents necessary for the transfer of title, but fails to arrange through the Montana registrar for rtansfer of title to himself and returns with the vehicle from Montana to his own state and such state does not predicate ownership of a motor vehicle upon the acts of the registrar of Montana but on the conduct of the seller and buyer.

(3) *The statute violates the Due Process clause of the Fourteenth Amendment.*

By forcing a liability insurance carrier to insure the unknown purchaser of a vehicle from an insured dealer, the sale otherwise being completed as between the purchaser and the dealer, until the purchaser and the registrar of motor vehicles at their own time and convenience transfer title and thus ownership of the motor vehicle, the statute deprives the insurance carrier of property without due process of law. The statute forces insurance carriers who collect premiums only to insure automobile dealers, regardless of the number of subsequent purchasers thereafter and regardless of the terms of the insurance contract excluding coverage under such circumstances, to insure said purchasers. Liability is forced upon the insurance carrier regardless of the terms of the policy, unless and until the title is transferred on the books of the registrar no matter how often the vehicle changes hands.

(4) *Decision Places Undue Burden on Insurance Industry and Automotive Dealers Involved in Interstate Commerce.*

According to *Sec. 53-107, R.C.M.*, the person entitled to possession of a vehicle may demand the certificate of title from the seller, and if the seller refuses to surrender the certificate he is guilty of a misdemeanor. By deliberately refusing to forward the certificate of

title to the regsitrar, the purchaser of an auto from a dealer need never purchase any liability insurance of his own. He would always know that he was "in the good hands" of the garage liability carrier. Conceivably, this condition (as the car changes hands) could go on for years. This would constitute an intolerable burden on both the insurance and automobile industries.

* * *

Finally, because this is a dispute between three insurance carriers rather than a dispute between an insured and a carrier none of the three carriers involved should be favored by the interpretation of any of their respective policies.

> "In the absence of ambiguity in an insurance contract, ordinarily neither party thereto can be favored in its construction." *44 C.J.S., Insurance, Sec. 297(b).*

CONCLUSION

The net effect of *Sec. 53-109(d),* R.C.M., is to impair the contract between petitioner and *Midland* by forcing petitioner to insure persons that it never contracted to insure. Furthermore, the statute deprives petitioner of property without due process of law and constitutes an undue burden on interstate commerce.

Because *Sec. 53-109(d)* is unconstitutional, it is urged that *Glens Falls* is entitled to an adjudication that it owed no obligation to Parker either to defend him or pay any judgment that might have been obtained against

him as a result of the automobile collision of July 26, 1964.

IF SEC. 53-109(d) IS ALLOWED TO STAND, THE ONLY SOLUTION AVAILABLE TO THE INSURANCE INDUSTRY IN MONTANA IS TO CANCEL ALL COVERAGE FOR AUTOMOBILE DEALERS.

It is submitted that the petition for a Writ of Certiorari should be granted and the judgment of the Montana Supreme Court reversed.

Respectfully submitted,

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February 1969

APPENDIX

APPENDIX

Cause No. 45024

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF YELLOWSTONE

PAT OSTERMILLER, an infant, by EMMA OSTERMILLER, her guardian,

Plaintiff,

vs.

MICHAEL PARKER,

Defendant.

MICHAEL PARKER, a minor, by WILLIAM PARKER, his guardian ad litem,

Third-Party Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY; GLENS FALLS INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; and JOHN DOE INSURANCE COMPANY,

Third-Party Defendants,

vs.

WILLIAM G. PARKER and MARGARET PARKER,

Third-Party Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action being submitted to the Court, pursuant to the Stipulation of all of the parties appearing through their attorneys on July 11, 1967, and by an Order of the Court dated September 8, 1967, whereby it was agreed that issue of insurance coverage by Nationwide Mutual Insurance Company, Glens Falls Insurance Company and State Farm Mutual Automobile Insurance Company would be submitted to the Court on written Briefs, in advance of trial, to determine the issue of insurance coverage, and the case being so submitted, and the court having entered a judgment in favor of Nationwide Mutual Insurance Company and State Farm Mutual Automobile Insurance Company, on November 15, 1967, decreeing that said third-party defendants have no obligation under their respective policies to the third-party plaintiff, and further decreeing that the insurance policy issued by the third-party defendant, Glens Falls Insurance Company, did provide insurance coverage on the third-party plaintiffs, and further the third-party defendants, Nationwide Mutual Insurance Company and State Farm Mutual Automobile Insurance Company, having now filed a Motion for Summary Judgment to determine the same legal question, and the parties having stipulated that the said Motion for Summary Judgment may be decided upon the same briefs as were filed pursuant to stipulation and order referred to above, and the parties having waived

said notice of hearing on said Motion for Summary Judgment, and the said Motion for Summary Judgment having been presented to the court. The court being fully advised of the premises finds as follows:

FINDINGS OF FACT

1. The third-party defendant, Nationwide Mutual Insurance Company, insured the automobile owned by William G. Parker, however, said policy did not afford coverage on the vehicle driven by Michael Parker which is the subject of this action.

2. That the third-party defendant, State Farm Mutual Automobile Insurance Company, insured the vehicle in which the plaintiff was riding at the time of the accident, said policy providing "uninsured motorists" coverage on said vehicle, however, the court having found that insurance coverage was provided for the vehicle operated by the defendant, Michael Parker, by Glens Falls Insurance Company, said State Farm Mutual Automobile Insurance Company does not have any obligations under its policy to the third-party plaintiff.

3. That the insurance policy issued by third-party defendant, Glens Falls Insurance Company, on Midland Dodge, afforded insurance coverage to the vehicle operated by Michael Parker, the subject of this action, at the date of the accident. And, that said third-party defendant's policy does provide insurance coverage to the third-party plaintiffs.

CONCLUSIONS OF LAW

1. Insurance policy issued by the third-party defendant, Glens Falls Insurance Company, does provide insurance coverage to the third-party plaintiffs.

2. The third-party defendants, Nationwide Mutual Automobile Insurance Company, have no obligations under their respective policies to the third-party plaintiffs.

Let Judgment be entered accordingly.

Dated this 30th day of November, 1967.

C. B. SANDE
District Judge

Cause No. 45024

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR HE COUNTY OF YELLOWSTONE

PAT OSTERMILLER, an infant,
by EMMA OSTERMILLER, her guardian
Plaintiff,

vs.

MICHAEL PARKER,
Defendant.

MICHAEL PARKER, a minor, by
WILLIAM PARKER, his guardian ad litem,
Third-Party Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY; GLENS FALLS INSURANCE COMPANY; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANY,
Third-Party Defendants,

vs.

WILLIAM G. PARKER and
MARGARET PARKER,
Third-Party Defendants.

JUDGMENT

The parties hereto having Stipulated on July 11, 1967, that the issue of insurance coverage by Nationwide Mutual Insurance Company, Glens Falls Insurance

Company, Glens Falls Insurance Company and State Farm Mutual Automobile Insurance Company, third-party defendants, be submitted to the Court for decision on the basis of depositions on file herein and written briefs, and the Court having entered Judgment on behalf of Nationwide Mutual Insurance Company, and State Farm Mutual Automobile Insurance Company and against Glens Falls Insurance Company, and Nationwide Mutual Insurance Company and State Farm Mutual Automobile Insurance Company having now filed a Motion for Summary Judgment upon the issue of insurance coverage and the attorneys for the third-party defendants having entered into a stipulation agreeing *that the Court can now enter its judgment upon the Mo*tion for Summary Judgment without further notice to the parties, and upon the grounds that the pleadings, answers to interrogatories and depositions on file herein, and the briefs submitted by the third-party defendants pursuant to the stipulation of July 11, 1967, and the order of the court dated September 8, 1967, the Court now enters Judgment on the Motion for Summary Judgment, said judgment to supersede that judgment entered by the court on the 15th day of November, 1967.

And the Court having filed its Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED by the court that the in-

surance policy issued by the third-party defendant, Glens Falls Insurance Company, does provide insurance coverage to the third-party plaintiffs, and further that third-party plaintiff do have andn recover $571.80 from third-party defendant, Glens Falls Insurance Company.

IT IS FURTHER ADJUDGED, DECREED AND DECLARED that third-party defendant, Nationwide Mutual Insurance Company and State Farm Mutual Automobile Insurance Company, have no obligation under their respective policies to the third-party plaintiffs.

Dated this 30th day of November, 1967.

C. B. SANDE
District Judge

No. 11438

IN THE SUPREME COURT

of the

STATE OF MONTANA

1968

PAT OSTERMILLER, an infant by EMMA OSTERMILLER, her guardian,

Plaintiff,

vs.

MICHAEL PARKER,

Defendant.

MICHAEL PARKER, a minor, by WILLIAM PARKER, his guardian ad litem,

Third-Party Plaintiff and Respondent,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY; GLENS FALLS INSURANCE COMPANY; STATE FARM MUTUAL, et al.,

Third-Party Defendants and Appellants.

Appeal from: District Court of the Thirteenth Judicial District, Honorable C. B. Sande, Judge, presiding.

Counsel of Record:

For Respondents

Cooke, Moulton, Bellingham, Longo and Mather, Billings, Montana
Ward Swanser argued, Billings, Montana.

Crowley, Kilbourne, Haughey, Hanson, Gallagher and Bruce R. Toole, Billings, Montana
Bruce R. Toole argued, Billings, Montana.

For Appellants

Robert L. Kelleher argued, Billings, Montana.

Submitted: September 11, 1968
Decided: December 12, 1968

Filed December 12, 1968

THOMAS J. KEARNEY
Clerk

Mr. Chief Justice Harrison delivered the Opinion of the Court.

On July 15, 1964, William Parker purchased a 1956 two door Mercury automobile from Midland Dodge Inc. A 1954 two door Chevrolet was traded in on the Mercury, and William Parker signed a contract with Midland Dodge after his son, Michael, paid the dealer $100 in addition to the trade-in. Apparently, after two additional payments of $38 each which were to be made on August 2 and August 20, 1964, the Mercury was to belong to Michael.

At the time of the trade William Parker signed the purchase order agreement and also signed a promissory note. Midland Dodge kept the certificate of title, the certificate of registration, the notice of lien and the release of lien.

On July 26, 1964, Michael Parker was involved in an accident with an automobile driven by one Lloyd Papke, and in which one Pat Ostermiller was a passenger. Thereafter, on August 1 or 2, 1964, after the accident, William Parker paid the balance of $76 and Midland Dodge gave him the certificate of title, the certificate of registration, the notice of lien and the release of lien. William Parker failed to send the title to the registrar of motor vehicles at Deer Lodge because, as he put it in his deposition, "I didn't see no sense in it * * * because the car was demolished."

Subsequently there arose an original action, Pat Ostermiller v. Michael Parker, brought by Miss Ostermiller for injuries she sustained in the accident on July 26, 1964. Michael Parker, through William Parker, his guardian ad litem, then filed a third party complaint against Nationwide Mutual Insurance Company, the insurance carrier of William Parker; Glens Falls Insurance Company, the insurance carrier of Midland Dodge; State Farm Mutual Automobile Insurance Company, the insurance carrier of Pat Ostermiller's parents; and John Doe Insurance Company, the insurance carrier of Lloyd Papke.

The third party complaint alleged, *inter alia,* that the third party defendant, Nationwide, had in effect on July 26, 1964, a policy of liability insurance insuring William Parker and his son, Michael, who was alleged to be a resident of the same household, and that the

policy afforded coverage to persons operating non-owned and owned automobiles; that Glens Falls had in force at the time of said accident a policy of insurance insuring Midland Dodge; that if no coverage was afforded by either Nationwide or Glens Falls, then Pat Ostermiller was covered by the uninsured motorist coverage of a policy issued by State Farm Mutual to her parents.

In addition, the third party complaint alleged that John Doe Insurance Company had issued its policy of insurance providing for uninsured motorist coverage to Lloyd Papke, the driver of the automobile in which Miss Ostermiller was riding at the time of the accident. Apparently, John Doe Insurance Company was dismissed by the court on the grounds that there was no uninsured motorist coverage in that policy.

The depositions of Michael and William Parker were taken, the originals or copies of the policies issued by the three remaining insurance firms were submitted to the court as were copies of the certificate of title and a contract for agreement of sale between Midland Dodge and William Parker. The matter was then submitted to the court on briefs. Finally, based on the stipulation entered into by counsel for the three insurance companies submitting the matter on briefs, the court granted a motion for summary judgment in favor of Nationwide and State Farm and against Glens Falls.

Thereafter, because the original actions of Pat Os-

termiller v. Michael Parker and Lloyd Papke v. Michael Parker had been set for trial and because the court refused to postpone trial pending this appeal, Glens Falls settled the personal injury claim of Pat Ostermiller (who had married Lloyd Papke) and the property damage claim of Lloyd Papke. Glens Falls also paid to John C. Sheehy, Esq., attorney for the Parkers, $500 in attorney fees and reimbursed him for court costs in the amount of $21.80. These sums were contained in the judgment signed by District Judge C. B. Sande.

Glens Falls now appeals from the summary judgment and contends that either Nationwide or State Farm, under their uninsured motorist coverage, are liable over to Glens Falls for the sums paid to the Papkes as well as for the money paid to attorney Sheehy.

Appellant contends that failure of William Parker to submit title to the registrar of motor vehicles as required by section 53-159(b), R.C.M. 1947, should not work prejudice against Midland Dodge or its insurer, Glens Falls. The subsection in question reads as follows:

> "Within ten (10) days thereafter (meaning after a transfer of title or interest), the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration, together with the information required under section 53-107, to the registrar, who shall file the same upon receipt thereof and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates

> are surrendered to that office or their loss established to his reasonable satisfaction."

In essence the appellant, Glens Falls, is contending that on July 15, 1964, there was a completed sale to William Parker so that William Parker's liability insurance policy covered the accident and so exempted Glens Falls and its insured, Midland Dodge, from liability. (Nationwide's policy issued to William Parker provided that for a period of 30 days any new automobile purchased by Mr. Parker would be covered even though the insurance company had not been notified of the purchase. As events developed, Mr. Parker had not notified his insurance carrier that he had purchased another automobile.)

We think this case can be decided on *one ground:* Whether or not there had been a completed sale, for if there was a completed sale there is no doubt Nationwide would be liable. However, we hold that there was not a completed sale. The Montana code section that controls in this case is section 53-109(d), which reads:

> "Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

This Court has previously held that the code section means exactly what it says. (Safeco Ins. Co. v.

N'western Mutual Ins. Co., 142 Mont. 155, 382 P.2d 174 (1963).) In that case at 164 we said:

> "There is nothing unrealistic, technical or artificial about this simple procedure for the transfer of ownership of a motor vehicle. While defendants contend that even when following the statutory procedure dire consequences could result because of what might occur during the ten-day period, it seems to us rather clear that when the seller has executed the transfer upon the certificate of ownership and delivered it and the motor vehicle the sale is complete and any delay on the part of the registrar in issuing the new certificate of ownership would have no effect. In any regular transaction the new certificate of ownership is required to be issued by the registrar and issues as a matter of course. The transfer then becomes complete and valid and dates back to the time of the transfer between the parties. If the transfer has not been made in compliance with the statute and the registrar by reason thereof does not issue a new certificate of ownership, clearly there was no transfer of ownership in its inception."

We affirm what we said in that case. Appellant argues that there was a completed stale on July 15, 1964, and further argues that under section 53-109(b) William Parker had ten days in which to comply with the statute in order to effect a completed transfer. That is, Mr. Parker had until July 25th, the day before the accident, to comply with the statute, and that his failure to do so should not prejudice Glens Falls or Midland Dodge. Yet it must be remembered that during those 10 days, and in fact until August 1 or 2, when the note was paid off, Midland Dodge was in possession of the

certificates. It was Midland Dodge's own omission, their failure to give Mr. Parker the certificates, that prevented his forwarding them to the registrar of motor vehicles. It is clear from Mr. Parker's deposition, when he says he knew from previous dealings that Midland Dodge would keep the certificates, that Midland Dodge intended to keep the certificates until the promissory note was paid. His testimony on that point is uncontradicted.

In effect, Midland Dodge was saying: We're going to keep these certificates for 36 days (July 15 to August 20 when the second payment will be due) and if you don't pay the note we will repossess the car. Under those circumstances it can hardly be contended that they felt they had made a completed sale. At the same time that they retained possession of the certificates they also want to contend that it was Mr. Parker's duty to send those certificates to the registrar and that since he did not do so they should not be prejudiced. We will not be a party to any such scheme and in doing so hold that Mr. Parker's insurance carrier should be liable for an omission on the part of Midland Dodge. Instead we hold in accord with what we said in the Safeco case, cited supra, and hold that there was no completed sale.

Next is the question whether Nationwide should be liable as insurer of a non-owned vehicle while such vehicle is being operated by the insured or any member

of his household. We think it should not. The Nationwide policy specifically provided that coverages under the policy should extend to any other land motor vehicle provided it was not furnished for regular use to the policyholder or a member of the same household. Since we have held that there was no completed sale here, we must conclude that the car was furnished for regular use to the policyholder or a member of the same household and was so excluded by the policy provisions of the Nationwide policy from coverage under that policy.

For the foregoing reasons we affirm the judgment below in favor of Nationwide and State Farm and against Glens Falls.

JAMES T. HARRISON
Chief Justice

We concur:

FRANK I. HASWELL
HUGH R. ADAIR
WESLEY CASTLES
JOHN CONWAY HARRISON
Associate Justices

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FILED
MAR 27 1969
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In the Supreme Court

of the

United States

October Term 1968

No. 1136

GLENS FALLS INSURANCE COMPANY,

Petitioner,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

Brief of Respondent Nationwide Mutual Insurance Company in Opposition to Petition of Glens Falls Insurance Company for a Writ of Certiorari to The Supreme Court of the State of Montana

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In the Supreme Court

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In the Supreme Court

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GLENS FALLS INSURANCE COMPANY,

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NATIONWIDE MUTUAL INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

THIS COURT HAS NO JURISDICTION

No federal question or constitutional issue was ever suggested to, considered by, nor passed upon by either the Montana State District Court or the Montana Supreme Court.

Prior to July 26, 1964, petitioner and respondents, each executed and delivered separate liability insurance contracts within the State of Montana to indemnify their insureds for all tort liability imposed on their insureds arising out of motor vehicle accidents. *Section 53-109, R.C.M. 1947,* governing the procedure for the transfer of any title or interest in motor vehicles, including the result of failing to comply with the procedure set out in the statute, had been in effect since 1945, some eighteen years before the contracts involved were executed. Statutes which subsist at the time and place of the making of a contract enter into and form a part of that contract as if the statutes were expressly incorporated in its terms, including those terms which affect its validity, construction, discharge, and enforcement *(Von Hoffman v. City of Quincy, 1866, 4 Wall. 535 at 550, 18 L.Ed. 403 at 408; Valier Company v. State, Mont., 123 Mont. 329, 215 P.2d 966, cert. den. 71 S.Ct. 63, 340 U.S. 827, 95 L.Ed. 607.)*

On July 26, 1964, there was an automobile accident in the State of Montana as a result of which the injured plaintiff filed a tort action in a Montana State District Court. The tort defendant, Michael Parker, filed a third-party complaint against the petitioner and the respondents claiming that he was insured under one or more of the three insurance contracts then in force and effect.

Petitioner Glens Falls Insurance Company filed ten or more documents in the third-party action in the Montana State District Court, including two answers; a motion for summary judgment; a stipulation for submission of the issue of insurance coverage to the Montana District Court prior to trial on written briefs; proposed findings of fact and conclusions of law; exceptions to findings of fact and conclusions of law; objection to the judgment entered; a motion for new trial; legal briefs presenting its views; and a notice of appeal. The Montana State District Court made findings of fact and conclusions of law *(Pet. app. 1)*, and entered its judgment *(Pet. app. 5)* that the insurance contract of the petitioner Glens Falls afforded coverage to the tort defenant, Michael Parker, as an insured under that Glens Falls contract. There was never suggested to the Montana District Court in any form whatsoever any federal question or issue of constitutional violation. The only issue that was ever presented to the Montana District Court was the construction and enforcement of the three insurance contracts under applicable Montana law.

On appeal to the Montana Supreme Court, the brief of the appellant is required to spell out a statement of the legal issues presented for review, and the argument in support thereof *(Rule 23, Montana Rules of Appellate Civil Procedure)*. The only legal issue presented to the Montana Supreme Court in this case by any party,

and the only issue decided, was the construction and enforcement of the three insurance contracts under applicable Montana state law as it had been construed in the State District Court *(Pet. app. 8)*.

The sole basis for claiming that this court has jurisdiction in this case is this statement by Glens Falls in its petition (wholly unsupported in the documentary records of this case):

> "During oral argument before the Montana Supreme Court, attorney for petitioner pointed out that if effect was not given to the foregoing exclusion, *Sec. 53-109(d) Revised Codes of Montana,* impaired the right of *Glens Falls* and *Midland* to contract. * * *" *(Pp. 6.)*

Such statement, if made, raises no valid legal issue under any law whether common law, Montana law, or federal law. As indicated above, *Section 53-109(d)*, enacted in 1945, was in full force and effect in 1963 or 1964 when the three insurance contracts involved were issued within the State of Montana. The statute when enacted in 1945 could not impair the obligations of these three insurance contracts not yet in existence. Petitioner Glens Falls was not obligated to enter into or issue its insurance contract . Furthermore, if the attorney for the petitioner made the oral argument to the Montana Supreme Court as worded in the petition, it does not even suggest an issue with respect to passage of an ex post facto law or law that would impair the obligations of existing contracts in violation of *Section 10, Article I;*

nor an issue with respect to violation of the power of Congress to regulate interstate commerce afforded by *Section 8, Article I;* nor an issue with respect to violation of the Fourteenth Amendment. As presented in the language of the petition the argument does not raise any valid legal issue of any description.

Rule 34, Montana Rules of Appellate Civil Procedure, entitled "Petitions for Rehearing," provides in part:

> "* * * A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed. Oral argument in support of the petition will not be permitted. * * *"

If counsel for petitioner made the oral argument to the Supreme Court of Montana as suggested in the petition, it was never called to the attention of the Supreme Court of Montana in any petition for rehearing, because no petition for rehearing was ever filed.

The case decisions of the Supreme Court of the United States cited or quoted by the petitioner Glens Falls Insurance Company do not support its contention that this court has jurisdiction. They hold directly to the contrary under the facts of this case. It is essential to the jurisdiction of this court in entertaining a petition for writ of certiorari to the Supreme Court of any state,

that one of the federal questions involved must first have been raised in, and presented to, the state court. Such is not the fact situation in this case. Such was the fact situation in each of the cases cited or quoted in the petition of Glens Falls. For example, in *International Harvester Company v. Missouri, 234 U.S. 199, 58 L.Ed. 1276, 34 S.Ct. 859,* the plaintiff in error had filed in the state court written exceptions to a report of a special commissioner on the specific ground that the Missouri statute violated the equality clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States. In *Bank of Commerce v. State of Tennessee, 161 U.S. 134, 16 S.Ct. 456, 40 L.Ed. 645; on rehearing, 163 U.S. 416, 16 S.Ct. 1113, 41 L.Ed. 211,* the bill of complaint in the State court filed by the State of Tennessee set forth the charter provisions of the Bank of Commerce granted in 1856, the tax laws enacted in 1887, and sought a judgment against the Bank for the taxes levied under those statutes from and after 1887. The Bank filed in the State court a demurrer to that complaint on the specific ground that the general tax laws of 1887 violated the charter provisions of 1856, and were unlawful under the contract provisions of the United States Constitution *(16 S.Ct. at 457).* In *San Jose Land, etc., Company v. San Jose Ranch Company, 189 U.S. 177, 23 S.Ct. 487, 47 L.Ed. 765,* the federal question involved was presented in the State court in a

motion for new trial, in the assignments of error to the Supreme Court of the state, and was spelled out in the opinion of the State Supreme Court. In *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux, 279 U.S. 737, 49 S.Ct. 485, 73 L.Ed. 931,* the action was begun in a State court of Texas in 1918 to enjoin the defendant corporation from using any imitation of the name, constitution, titles, etc., of the plaintiff corporation. The answer of the defendant corporation set up the fact that it was incorporated in 1901 under an Act of Congress of May 5, 1870, and asserted that by virtue of the provisions of that Congressional Act, and its incorporation thereunder, the plaintiff was not entitled to any relief, and the same point was presented to the state Appellate Court *(49 S.Ct. at 487-488).* The Supreme Court of the United States said in part:

> "The right thus specially set up in the state court is a federal right. * * *"
>
> *(49 S.Ct. at 488.)*

Under the facts in this case as outlined above, and under the foregoing opinions of the Supreme Court of the United States cited, quoted, and relied upon by the petitioner Glens Falls, this court has no jurisdiction to entertain this petition for writ of certiorari to the Supreme Court of the State of Montana.

This court has no jurisdiction to entertain this petition under the following additional authorities:

Rules 19 and 23(f) Revised Rules of the Supreme Court of the United States, effective October 2, 1967;

Section 1257(3), Title 28 U.S.C.A.;

Black v. Cutter Laboratories, 1956, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188;

Ellis v. Dixon, 1955, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231;

Louisville & N. R. Co. v. City of Louisville, 166 U.S. 709, 17 S.Ct. 725, 41 L.Ed 1173.

CONCLUSION

This court has no jurisdiction to entertain this petition for writ of certiorari to the Supreme Court of the State of Montana, because the only issue which was ever raised in, presented to, or considered, or decided by either the Montana State District Court or the Supreme Court of the State of Montana, was the construction and enforcement under applicable Montana state law of three Montana contracts of insurance. No federal question or issue of Constitutional law was ever presented to or decided by the state courts, and, in fact, none such is even presented in or raised by the present petition.

In any event, the case is not one of such broad application or importance to warrant this court in accepting the petition even if the court had jurisdiction.

We respectfully submit that the petition of Glens Falls Insurance Company for a writ of certiorari to the

Supreme Court of the State of Montana should be denied.

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In the Supreme Court

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October Term 1968

GLENS FALLS INSURANCE COMPANY,

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vs.

NATIONWIDE MUTUAL INSURANCE COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondents.

Brief of Respondent
State Farm Mutual Automobile Insurance Company
In Opposition for Writ of Certiorari

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In the Supreme Court

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Respondents.

Brief of Respondent
State Farm Mutual Automobile Insurance Company
In Opposition for Writ of Certiorari

OPINION BELOW

The judgment rendered by the Montana District Court and the opinion of the Montana Supreme Court are set forth in Petitioner's brief. The opinion of the Montana Supreme Court has not yet been reported.

THIS COURT HAS NO JURISDICTION

Before the Supreme Court of the United States accepts jurisdiction on a writ of certiorari of a State Court, there must be a federal question of substance involved, *Rule 19(a), Supreme Court of the United States Rules.* Petitioner in his brief must also set forth the following information: the manner in which the question was raised; the method of raising the question; the way it was treated by the state court; and the reference made to the federal question by the state court, *Rule 23(f), Supreme Court of the United States Rules.*

In the instant case the record clearly shows that no contention was ever made that a federal question was involved in either the State District Court proceedings or on the appeal to the Montana Supreme Court. The only question presented in either court was the validity, construction and enforcement of the three Montana insurance contracts, in light of applicable Montana law. Montana law was applied and governed the construction of the contract. *No* federal question was advanced. The first mention of there being a federal question involved was the reference made in Petitioner's brief to a statement made by its counsel on oral argument to the Montana Supreme Court. At no time was the question ever presented in the briefs of the respective parties.

Conceding that Petitionr mentioned a federal question in oral argument, we contended that such a state-

ment fails to properly raise a federal question, which would invoke the jurisdiction of this Court.

In *Ellis v. Dixon* (N.Y. 1955), 75 S.Ct. 850, 349 U.S. 458, 99 L.ed. 1231, this court held that there was no adequate showing that a federal question was properly presented and therefore refused to assume jurisdiction on a writ of certiorari. We submit that what the court stated at p. 1236 is controlling of this case, wherein they noted:

> "This court has often refused to decide constiutional questions on an inadequate record (citing cases). In the circumstances of this case, we prefer to rest our decision on the ground that we lack jurisdiction. For if we could not ourselves decide on this record the constitutional issues tendered, we consider that by the same token the New York Court of Appeals was entirely justified in refusing to pass on them, and that we should therefore regard its denial of leave to appeal as resting on an adequate non-federal ground."

If the petitioner seriously felt that a federal question of substance was properly presented to the Montana Supreme Court and that the Montana Court overlooked the question in its opinion, it should have petitioned for rehearing or provided for in *Rule 34 of the Montana Rules of Appellate Civil Procedure,* which provides in part:

> " * * * A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the Court, or that the decision is in con-

flict with an express statute or controlling decision to which the attention of the Court was not directed * * *."

By failing to give the Montana Supreme Court the opportunity to correct the error, if any, made in its opinion, we submit that Petitioner has now waived any right to contend that the Montana Supreme Court failed to consider the federal question, it contends was raised.

For the above reasons we submit that no federal question was properly raised and that this Court has no jurisdiction to entertain this petition.

STATUTES INVOLVED

No constitutional provisions are involved. The Petitioner recites that *R.C.M. Sec. 53-109 1947* is involved. We submit that said section does not raise a federal question, but for the Court's benefit, *Sec. 53-109* provides in part:

> "*Transfer of title or interest.* (a) Upon a transfer of any title or interest of an owner or owner in or to a motor vehicle registered under the provisions of this act as hereinbefore required, the person or persons whose title or interest is to be transferred shall write their signatures with pen and ink upon the certificate of ownership issued for such vehicle, in the appropriate space provided upon the reverse side of such certificate, and such signature shall be acknowledged before a notary public.
>
> (b) Within ten (10) days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration. together with the information required under section 53-107, to the registrar, who shall file the same

upon receipt thereof and no certificate of ownership and certificate of registration shall be issued by the registrar of motor vehicles until the outstanding certificates are surrendered to that office or their loss established to his reasonable satisfaction.

(c) The provisions of subsection (b) of this section, requiring a transferee to forward the certificate of ownership after endorsement and the certificate of registration to the registrar, shall not apply in the event of the transfer of a motor vehicle to a duly licensed automobile dealer intending to resell such vehicle and who operates the same only for demonstration purposes, but every such dealer shall upon transferring such interest deliver such certificate of ownership and certificate of registration with an application for registration executed by the new owner in accordance with the provisions of section 53-107, and the registrar upon receipt of said certificate of ownership certificate of registration and application for registration, together with the conditional sales contract or other lien, if any, shall issue a new certificate of ownership and certificate of registration together with a statement of any conditional sales contract, mortgage, or other lien as provided in said section 53-107.

(d) Until said registrar shall have issued a certificate of registration and certificate of ownership and statement as hereinbefore provided, delivery of any motor vehicle shall be deemed not to have been made and title thereto shall not have passed and said intended transfer shall be incomplete and not be valid or effective for any purpose."

The following portion of the Montana Rues of Appellate Civil Procedure is also pertinent:

"Rule 34. *Petitions for Rehearing.* * * * A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive

of the case submitted by counsel, was overlooked by the Court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the Court was not directed * * *."

QUESTION PRESENTED

We submit that the sole question presented is whether or not a federal question was properly raised so as to invoke this court's jurisdiction. We will, however, discuss Petitioner's arguments even though the only question presented to the Montana Supreme Court was the validity, construction and enforcement of the three Montana insurance contracts in light of applicable Montana law.

STATEMENT

Glens Falls Insurance Company insured Midland Dodge. On July 15, 1964, William Parker entered into an agreement with Midland Dodge to purchase a 1956 Mercury by signing a "car order". The price of the Mercury was $295.00 plus a $1.00 charge for "license, license transfer title, registration, etc.," for a total of $296.00. Mr. Parker give Midland Dodge $100.00 in cash to apply toward the purchase of the Mercury and traded in another car, leaving a balance due and owing on the 1956 Mercury of $76.00 for which Mr. Parker signed a promissory note. Mr. Parker then drove the Mercury home and retained possession of it until the date of the accident on July 26, 1964. Midland Dodge retained possession of the certificate of title and certifi-

cate of registration on the Mercury from July 15, 1964, until August 2, 1964, after the date of the accident, at which time the same was given to Mr. Parker when he paid the balance due and owing on the promissory note. Midland Dodge never sent in the title as required by *Sec. 53-109(c) R.C.M. 1947.* Instead of transferring the title as required by the Montana law, Midland Dodge retained title to the vehicle even though they had a valid purchase order agreement, a promissory note for the payment of the balance, and had collected $1.00 from Mr. Parker to transfer the title.

ARGUMENT

A. THE MONTANA SUPREME COURT IS NOT BOUND BY THE DECISION OF THE NINTH CIRCUIT.

Petitioner contends that the decision rendered by the Montana Supreme Court is in conflict with the Ninth Circuit Court's opinion in *Colbrese v. National Farmers Union Prop. & Casualty Co.,* (1967) 368 F.2d 425. This however, does not raise a federal question. In the *Colbrese* decision, the federal court interpreted Montana law and in *State ex rel. City of Livingston v. State Water Conservation Board* (1958), 134 Mont. 403 332 P.2d 913, the Montana Supreme Court held that a federal court decision interpreting Montana law is not binding on the state court, and that the interpretation of Montana law is primarily a function to be borne by the state courts.

We therefore submit that there is no merit to the Petitioner's first contention.

B. SECTION 53-109(d) DOES NOT IMPAIR PETITIONER'S RIGHT TO CONTRACT.

The above section was first enacted in 1937 and amended in 1945. The Glens Falls insurance contract with Midland Dodge was entered into many years later. Montana law requires insurance contracts to conform to existing statutes. The effect to be given a prior statute in interpreting a subsequently entered into contract was discussed in *Valier Company v. State* (1959), 123 Mont. 329, 215 P.2d 966, where the court said at p. 973:

> " 'The laws which subsists at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.' (citing cases) The above quotation is quoted with approval in City of Philipsburg v. Porter, Mont., 190 P.2d 676, at page 678, wherein is also cited a number of Montana cases to the same effect. (citing cases)"

Petitioner was free to contract with Midland Dodge, but upon doing so it assumed the obligation of entering into a contract which was not violative of *Sec. 53-109.*

C. THE MONTANA STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Glens Falls entered into the insurance contract with

Midland Dodge having full knowledge of *Sec. 53-109* and the interpretation placed upon said provision by the Montana Supreme Court in *Safeco Ins. Co. of America v. Northwestern Ins. Co.* (1963), 142 Mont. 155, 382 P.2d 174. Glens Falls' insured's failure to comply with the statute, which required it to send in the title to the registrar of motor vehicles, cannot now be contended to be a violation of due process. This is especially relevant when you consider that Petitioner's insured charged for transferring the title, but failed to do so.

D. THE DECISION DOES NOT PLACE ANY UNDUE BURDEN UPON THE INSURANCE INDUSTRY INVOLVED IN INTERSTATE COMMERCE.

This contention deserves little, if any, comment. This was a Montana insurance contract to be interpreted in accordance with Montana law. Petitioner's insured chose to ignore the law and as a result must suffer the consequences.

CONCLUSIONS

Respondent first contends that there was no federal question raised and therefore this court has no jurisdiction.

We further contend that all of Petitioner's arguments are without merit.

We therefore respectfully submit that the petition should be denied.

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PROOF OF SERVICE

I, - CHARLES C. COLLINS, one of the attorneys for Respondent State Farm Mutual Automobile Insurance Company herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7 day of April, 1969, I served one copy of the foregoing Brief of Respondent State Farm Mutual Automobile Insurance Company In Opposition for Writ of Certiorari, by mailing copies in duly addressed envelope with first-class postage prepaid, to:

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